## CHONG THIAN YIN & ORS. v. THE TRUSTEES OF THE ESTATE OF CHEANG KOK SANG ALIAS CHEANG KWOK SANG, DECD. AND THE COMMISSIONER OF LANDS FEDERATION OF MALAYA.

[A. C. J. (Thomson, J.) August 7, 1953]

[Ipoh — Civil Appeals Nos. 16, 17 & 18 of 1952]

*Practice and Procedure — Appeal — Titles to Land (Occupation Period) Appeal Rules, 1950, r. 5(3) — Non-compliance with — No power to extend time.*

By rule 5(3) of the Titles to Land (Occupation Period) Appeal Rules, 1950, "the appellant shall at the time of filing the record serve one copy thereof on the Commissioner and one copy on each of the interested parties." The appellants filed the record of Appeal on the 10th December, 1952 and served a copy of the record on the respondents on the 27th July, 1953.

Held: (1) the Court has no power to extend the time mentioned in rule 5(3); (2) the provision in rule 5(3) with respect to the term of delivery of the record of appeal to the interested parties was obligatory and that is, that it amounted to a condition precedent and it has not been complied with the appeals have in effect become a nullity.

*Case referred to:—*

(1) *Barker v. Palmer* (1881) 8 Q.B.D. 9.

CIVIL APPEAL.

Appellants by their Attorney.

*S. K. Das* (*K. S. Lim* with him) for the respondents No. 1.

**Thomson, J.** [delivering oral judgment]: — I am concerned here with three purported appeals from decisions of the Commissioner of Lands given under the Titles to Land (Occupation Period) Ordinance, 1949.

The respondents have the advantage of being represented by learned Counsel. The appellants labour under the misfortune, which of course may be the result of their own folly, of being represented by a person by the name of Loh Ah Kee who holds a power of attorney from each of them which would appear to authorise him to conduct these proceedings on their behalf. They seem to have laboured under this disadvantage throughout the proceedings from the date of their inception.

A preliminary objection has been taken to the present appeals by the respondents, and I propose to deal with that by itself without even allowing their minds to approach the merits.

The facts in so far as they are relevant are not in dispute. On 10th December, 1952, Loh Ah Kee on behalf of each of the appellants filed in the Registry of this Court a record of proceedings before the Commissioner. Notice of appeal had already been given within the prescribed time. There was no need for Loh to have filed the records on 10th December, and, frankly, I fail to see why he did so. The Commissioner did not sign his certificate until the 26th January, 1953, and the appellants had 21 days after that date to file the records. The point, however, is without importance.

The other material date in the case is the 27th of July, 1953. On that date the appellants served a copy of the record upon the interested parties who are the 1st respondents to the present appeals. There was thus a failure to comply with the provisions of rule 5(3) of the Titles to Land (Occupation Period) Appeal Rules, 1950, which reads as follows:—

"The appellant shall at the time of filing the record serve one copy thereof on the Commissioner and one copy on each of the interested parties."

I am not concerned to consider at length the meaning of the word 'serve' in that rule. It may well be that it means taking steps to serve or initiate a process which will normally result in service. That is beside the point, for clearly here no attempt was made to serve until at the very earliest some two or three days before the 27th July. There has thus been a clear failure to comply with the rule and what I have to consider is whether that failure is fatal to the appeals.

The question raises the issue which in some cases has given rise to some difficulty as to whether a provision of this nature, that is of the nature of rule 5(3), is an obligatory or directory one, whether it amounts to a condition precedent lack of compliance of which is fatal, or whether it is merely directory and can be said to be complied with by substantial though not literal compliance. That is a question of a type that has given the Courts some trouble and concern in the past.

In the present case, however, I think the answer is clear and it is to be found by a consideration of the case of *Barker v. Palmer*[1].

In that case the Court was concerned with one of the County Court Rules made under the then operative County Courts Act which reads as follows (Order VIII, rule 7 of the County Court Rules, 1875):—

"The summons in an action brought to recover lands shall be delivered to the bailiff forty clear days at least before the return day, and shall be served thirty-five clear days before the return day thereof."

The plaintiff in an action in the County Court to recover lands delivered the summons to the bailiff thirty-nine clear days, and the bailiff served it upon the defendant thirty-eight clear days before the return date, and at the hearing the County Court Judge ruled that the service was good, and tried the case giving judgment for the plaintiff. On appeal it was held that the provision in Order VIII, rule 7 of the

County Court Rules with respect to the time of delivery of summons to the bailiff was obligatory, and not merely directory, and therefore that the judge ought not to have tried the case. Grove, J., used the following words, which so far as I am aware have never since been disapproved of and which to my mind conclude the matter :—

"In construing Acts of Parliament, provisions which appear on the face of them obligatory, cannot, without strong reasons given, be held only directory. The rule is, that provisions with respect to time are always obligatory unless a power of extending the time is given to the Court, and there is no such power here."

In the rules with which I am concerned in the present case there is no power to extend the time mentioned in Rule 5(3). I must therefore hold that that rule is obligatory, that is, that it amounts to a condition precedent and as it has not been complied with the appeals have in effect become a nullity and cannot therefore be proceeded with. There will be judgment accordingly.

The order will be that the appeals are struck out and that the appellants in each case is condemned in costs.

*Order accordingly.*

Solicitors for respondents No. 1 : *Lim Lim & Onn.*

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## ENG SONG HAI v. PUBLIC PROSECUTOR.

[A. Cr. J. (Bellamy, J.) December 19, 1953]

[Malacca — Criminal Appeal No. 14 of 1953]

*Dangerous Drugs Ordinance, 1952 — Whether evidence of delivery of Chemist's report is necessary where accused had pleaded guilty to the charge — Sentence — Criminal Procedure Code s. 427(1).*

This was an appeal against the conviction and sentence of the appellant for possession of prepared opium. At the trial the appellant pleaded guilty. On appeal it was argued that the conviction was bad as there was no evidence that a copy of the Chemist's report had been delivered to the appellant as required by section 427(1) of the Criminal Procedure Code.

**Held:** (1) as the appellant had pleaded guilty there was no question of the prosecution proving their case and therefore it was not necessary for the learned Magistrate to have evidence that the provisions of section 427(1) of the Criminal Procedure Code had been complied with; (2) if the Court felt a sentence of imprisonment was necessary to effect a cure it should have the assistance of expert medical opinion in deciding how long was required in the case of the accused, and to impose a prison sentence to effect a cure without such medical evidence can only lead to possible injustice for an accused person.

*Case referred to:—*

(1) *Teo Heo Huat v. R.* (1949) M.L.J. 271.

CRIMINAL APPEAL.

*W. H. Sault* for the appellant.

*L. A. Massie* (Federal Counsel) for the respondent.

**Bellamy, J.** : — The appellant pleaded guilty to having in his possession 3 tahils and 9 hoons of prepared opium in contravention of section 9(1) (b) of the Dangerous Drugs Ordinance, 1952 and, having admitted the facts and a previous conviction for the same type of offence on the 18th March this year when he was bound over in the sum of $200 with one surety for a period of twelve months, he was sentenced to twelve months' imprisonment and a fine of $250 and, in default of payment of the fine, he was ordered to suffer a further term of three months' imprisonment. Originally this appeal was against sentence only, but at the hearing Mr. Sault applied for leave to appeal against the conviction on one ground only, namely, that there was no proof that a copy of the report of the Chemist, the original of which was given in evidence by the prosecution, had been delivered to the appellant not less than ten clear days before the commencement of the trial as required by section 427(1) of the Criminal Procedure Code of the Straits Settlements, which I granted.

In considering this point it is material to set out the course which the proceedings took before the Sessions Court. After his arrest on the 6th October, 1953, the appellant was produced before the Sessions Court on the 8th October. The charge was read and explained to him *ex abundanti cautela,* no plea was taken, the case being postponed to the 26th October to give the prosecution an opportunity of getting the articles found in the possession of the appellant analysed by a Government Chemist and of delivering a copy of the Chemist's report to the appellant as required by the section of the Criminal Procedure Code I have already mentioned. In the meantime there was a change of Presidents of the Sessions Court. On the 26th October, 1953, on the application of the prosecuting officer, the original charge against the appellant was amended to conform with the report of the Chemist and the appellant was charged with the charge as amended. To this charge he pleaded guilty. The prosecuting officer then narrated the facts to the Court, at the same time producing the report of the Chemist, the articles found in the appellant's possession and the record of the previous conviction of the appellant. The President thereupon convicted the appellant, and the appellant, admitting the previous conviction, was sentenced as I have stated. There was no proof before the Court that a copy of the Chemist's report had been delivered to the appellant as required by section 427(1) of the Criminal Procedure Code of the Straits Settlements, or at all, before the 26th October. It was argued that this failure was fatal. I do not think so. The appellant had pleaded guilty to the charge as amended, and no question then arose of the prosecution